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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARY JANE HOLLYDAY,

Petitioner,

v.

GENE E. RAINEY, CHAIRMAN OF THE BUNCOMBE COUNTY COMMISSIONERS, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNTER-STATEMENT OF THE CASE

Plaintiff, Mary Jane Hollyday, was hired by Buncombe County, North Carolina, in January 1987, to fill the newly-created position as office manager in the tax assessor's office. The position was

established by the Board of County Commissioners.

There was a general election in Buncombe County for county commissioner in November 1988. A prominent issue for the Democratic candidates during the campaign was whether to reorganize county government. In the election, the Republican majority was voted out and the Democrats assumed a majority position on the Board of Commissioners.

After the election, the newly elected commissioners began searching for ways to streamline county government. They asked department heads if there were any areas where reductions in force could be made and also asked Michael Kirstein, who was serving as transitional county manager, to review the organization of county government to determine if any positions could be eliminated in order to save

money.

At a Board of Commissioners meeting on December 16, 1988, a motion was made to abolish the office manager position in the tax assessor's office. The motion passed three to one. Plaintiff was subsequently laid off because the position she occupied had been abolished.

The duties performed by plaintiff before abolishment of the position were transferred to other employees in the tax assessor's office. The reappraisal project on which plaintiff had been working was successfully completed. Abolishing the position did not adversely affect completion of the reappraisal project. The position has never been re-established and no one was ever hired to assume those duties.

Contemporaneously with abolishment of the office manager's position,

applications for the position of assistant tax assessor were solicited. This position had been budgeted for several years, but had remained unfilled since before plaintiff's employment. Plaintiff applied for this position, but it was abolished before anyone was offered the job.

Plaintiff filed suit under 42 U.S.C. Section 1983 contending that the office manager position was abolished in retaliation for her exercise of first amendment rights, specifically, her political affiliation. Plaintiff has sued Democratic commissioners Rainey, Sobol, Stanley and Giezentanner in their official and individual capacities, Republican commissioner Ledbetter in his official capacity, and Buncombe County. She has also sued the personnel director, Robert Thornberry, in his official and individual

capacities and Michael Kirstein, who was serving as transitional county manager, in his official and individual capacities.

Thornberry had no involvement whatsoever in the decision to abolish the office manager's position. His only involvement in this case was to execute a personnel action form that caused plaintiff to be laid off pursuant to the facially valid directive of the Board of Commissioners that the position held by plaintiff be abolished.

Kirstein's only involvement was to make recommendations to the Board of Commissioners on areas where the county's personnel budget could be streamlined. The North Carolina General Assembly has delegated the responsibility for organizing county government to the Board of Commissioners in each county. By statute, the Board of Commissioners has

authority to "create, change, abolish and consolidate offices, positions, departments, boards, commissions, and agencies of the county government." N.C. Gen. Stat. Section 153A-76 (Resp. App. at 1a). Thus, Kirstein's only involvement in this matter was to advise the Board of Commissioners on matters within their legislative province.

REASONS FOR DENYING WRIT

1. The issues raised by plaintiff in her Petition for Writ of Certiorari were not determinative of the Fourth Circuit's decision.

Defendants moved for summary judgment in the district court. The motion was supported by affidavits and briefs which established several key facts that were uncontested by plaintiff in the proceedings below. Some of the key facts established below that plaintiff has not

contested are: (1) plaintiff's position was abolished by a legislative act; (2) the position has never been re-established, nobody was hired to replace plaintiff and her duties were successfully reassigned to other employees; (3) plaintiff was laid off, not terminated, because the position she held was abolished; and (4) another job plaintiff applied for was abolished by a legislative act and nobody was ever hired. On these undisputed facts, the district court granted summary judgment for defendants. The Fourth Circuit affirmed in a decision written by Judge Hall. Judge Luttig concurred in the result on different grounds than those relied upon by Judge Hall. Judge Butzner dissented.

The specific reasons argued by plaintiff as grounds to support issuing a writ of certiorari are discussed by

defendants in more detail below. It is important at the outset to note, however, that the decision of the Fourth Circuit did not turn on the issues raised by plaintiff in her Petition. Instead, the Fourth Circuit's decision was based on the particular facts of this case and on Judge Luttig's conclusion that plaintiff failed to meet her evidentiary burden under Fed.R.Civ.P. 56.

Judge Hall concluded that legislative immunity barred plaintiff's claims against the individual commissioners and their aides where plaintiff sought to challenge the legislative decision to abolish a public position. Abolishing a public position is an exercise of legislative power that may be executed by the state at its pleasure. Goldsmith v. Mayor and City Council of Baltimore, 845 F.2d 61, 64 (4th Cir. 1988). Judge Hall further held in

accordance with recent fourth circuit precedent, Schlitz v. Commonwealth of Virginia, 854 F.2d 43 (4th Cir. 1988), and Baker v. Mayor and City Council of Baltimore, 894 F.2d 679 (4th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 56 (1990), that regardless of who is a party to the action, the county commissioner-legislators cannot be required to testify about their reasons and motives for adopting the legislation which abolished the office manager position. Concluding that the county itself would be unable to defend the action without testimony from the commissioners about their reasons and motivations for enacting the legislation, Judge Hall concluded that plaintiff could not pursue her claims against the county.

Concurring in the result, Judge Luttig did not decide the immunity issues upon which Judge Hall relied and which

form the basis of plaintiff's Petition for a Writ of Certiorari. Rather, Judge Luttig ruled that plaintiff did not meet her burden under Fed.R.Civ.P. 56 of presenting some evidence that she was retaliated against or that abolishment of her position was caused by some custom or policy of the county.

Judge Luttig correctly applied Rule 56 as required by Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Plaintiff presented no evidence to establish that abolishment of the office manager position was motivated by anything other than a desire to streamline county government. Furthermore, plaintiff failed to identify any custom or policy of the county that might have led to abolishment of the position. Thus, the Fourth Circuit's decision was ultimately based on plaintiff's lack of evidence to support

her claims of retaliation and not on the issues raised in her Petition for Writ of Certiorari.

Regardless of the basis of the Fourth Circuit's decision in this case, the writ should not be issued. Judge Hall's opinion, which plaintiff seeks review of, is consistent with decisions of this Court and does not address matters which need to be reviewed by the Supreme Court.

2. Applying legislative immunity to local legislators is consistent with decisions of the Supreme Court and of other circuit courts of appeal.

The doctrine of legislative immunity protects public officials engaged in legislative functions not only from the consequences of litigation but from the burden of defending themselves. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). The purpose of the doctrine is to prevent legislators from having to testify

regarding matters of legislative conduct, regardless of whether they are testifying to defend themselves or in a proceeding to which they are not parties. Gravel v. United States, 408 U.S. 606, 616 (1972). The immunity assures legislators that they may have wide ranging debates and make the hard decisions that face them without the fear of having to account for their decisions in a court. Id.; Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

Legislative immunity was specifically extended by this Court to state legislators in Tenney, and to regional legislators in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). The immunity was also extended to the Supreme Court of Virginia where it was engaged in legislative functions that had been delegated to it by Virginia's state legislature in Supreme

Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980).

The legislative authority to abolish a public position exercised in this case was delegated to the Buncombe County Board of Commissioners by North Carolina's General Assembly. See N.C. Gen. Stat. Section 153A-76 (Resp. App. at 1). Judge Hall's conclusion that legislative immunity protects the county commissioners when fulfilling legislative responsibilities that have been delegated to them by the state legislature is consistent with this Court's holding in Supreme Court of Virginia v. Consumers Union. Furthermore, every circuit that has addressed the issue has concluded that local legislators are protected by legislative immunity. See Shoultes v. Laidlaw, 886 F.2d 114, 117 (6th Cir.

1989); Rateree v. Rockett, 852 F.2d 946, 949 (7th Cir. 1988); Healy v. Town of Pembroke Park, 831 F.2d 989 (11th Cir. 1987); Aitchison v. Raffiani, 708 F.2d 96, 98-99 (3d Cir. 1983). No case has been located holding that legislative immunity does not extend to local legislators.

The consistent application of legislative immunity to local legislators by the Fourth Circuit and other courts of appeal is consistent with decisions of the Supreme Court and is not a matter that requires review by the Supreme Court.

3. Applying legislative immunity to legislative aides is consistent with decisions of the Supreme Court.

Plaintiff contends that the Fourth Circuit misconstrued Supreme Court precedent in extending legislative immunity to persons who execute decisions of local legislatures. Plaintiff does not specify whether her argument is directed

to Mr. Thornberry, the personnel director, or Mr. Kirstein, the transitional county manager.

With regard to Mr. Thornberry, Judge Hall held that legislative immunity barred the claims against him because defending the claims would require testimony from the county commissioners about their motives in abolishing the office manager position. Judge Hall did not reach the issue of qualified immunity which the district court held would protect Thornberry.

Thornberry's only action was to execute a personnel action form that caused plaintiff to be laid off because her position had been abolished. Such action was ministerial in nature and was taken based on a facially valid enactment of the Board of County Commissioners.

Plaintiff relies on Powell v.

McCormack, 395 U.S. 486 (1969), Dombrowski v. Eastland, and Kilbourn v. Thompson, 103 U.S. 168 (1881) in support of her argument. Each of those cases are easily distinguishable from the facts of this case. In Powell and Kilbourn, the Sergeant at Arms of the United States House of Representatives was sued to prevent him from taking action that had been mandated by Congress. The issues in those cases could be decided by looking at the face of the legislation in issue and did not require an inquiry into the motives underlying the litigation. In Dombrowski, the defendant for whom legislative immunity was not applied was alleged to have been engaged in planning illegal raids to secure property in violation of the Fourth Amendment. As noted by the Court in Gravel, "relief could be afforded [in Powell, Kilbourn and

Dombrowski] without proof of a legislative act or the motives or purposes underlying such an act." Gravel, 408 U.S. at 621.

Unlike Powell, Kilbourn and Dombrowski, plaintiff cannot recover from Thornberry without proof of the motives or purposes underlying the legislative act to abolish the office manager position. Thus, the decision as to Thornberry is consistent with this Court's statements in Gravel. Furthermore, the cases relied upon by plaintiff were decided before development of the qualified immunity defense which was found to be applicable to Thornberry by the district court. See Pet. App. at 70a-72a. Thus, the result as to Thornberry is correct without regard to the issues raised by plaintiff.

As noted above, Kirstein's only involvement in this matter was to advise the county commissioners on matters within

their legislative province. In Gravel, the Court held that legislative immunity extends to the conduct of legislative assistants if the legislator himself would be entitled to claim the protection of legislative immunity. Gravel, 408 U.S. at 616-17. The Court noted that the day to day work of such aides is so critical to legislators' performance that they must be protected by legislative immunity. Id. Furthermore, plaintiff has presented not even a shred of evidence to suggest that Kirstein consciously or subconsciously retaliated against her.

The application of legislative immunity to Thornberry and Kirstein is entirely consistent with this Court's decision in Gravel and the writ should not be issued on this basis.

4. Applying legislative immunity to claims for non-monetary relief is consistent with decisions of the Supreme Court.

In Section III of plaintiff's petition, she argues that the act of abolishing the office manager position may not have been a legislative act and that legislative immunity would not bar claims for declaratory or injunctive relief.[1] On both grounds, Judge Hall's opinion is consistent with Supreme Court precedent.

First, plaintiff should be barred from arguing that the decision to abolish her position was not a legislative act. At no point in the proceedings below did

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[1] Plaintiff also argued in Section III of her petition that abolishing the office manager position constitutes a bill of attainder in violation of U.S.Const. Art. I, Sec. 9. Plaintiff cites no authority for this proposition which was not even raised in the courts below. This is not a ground on which to grant review in this case.

plaintiff contend that the action of abolishing the office manager position was not a legislative act. See Pet.App. at 60a (Magistrate Davis found "[i]t is undisputed that the position of manager of the county assesor's office and the position of assistant county assessor were abolished by a legislative act of the county board of commissioners.").

Plaintiff's reliance on Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980) and Rutan v. Republican Party of Illinois, 497 U.S. ____, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) do not address the issues raised by legislative immunity. Elrod, Branti and Rutan, concern the purely administrative decisions of determining who should be employed for a public position after that position has been established by the appropriate governing body or, after

positions are eliminated, determining which of several persons occupying identical positions should be laid off (i.e. reducing the number of police officer positions and deciding which of several incumbent police officers should be laid off). Those cases do not address the situation presented here which concerns the legislative decision about whether or not a particular position should be created or abolished. The authority of the county to create or abolish positions is well established, See Goldsmith, 845 F.2d at 64.

Acevedo-Cordero v. Cordero-Santiago, 958 F.2d 20 (1st Cir. 1992), cited by plaintiff, is distinguishable from the instant case and does not support plaintiff's contention that the abolishment of the office manager position by the Board of Commissioners was not a

legislative act. In Acevedo-Cordero, a new city administration eliminated approximately 600 positions in the City's civil service and also identified the particular employees to be terminated. Plaintiffs alleged that their positions were being terminated for political purposes so the defendants could replace them with members of their own party. Acevedo-Cordero, 958 F.2d at 21.

In contrast, plaintiff in the instant case, has never alleged that the office manager position was abolished and that she was laid off so that defendants could replace her with someone of their own party. Indeed, the undisputed evidence in this case is that plaintiff has never been replaced.

Furthermore, in Acevedo-Cordero, the district court was presented with evidence on cross motions for summary judgment that

raised a factual issue about whether the action in question was legislative or administrative. Because there was a factual dispute about the threshold issue of whether there was a legislative act, the Court did not apply legislative immunity. In contrast, plaintiff in the instant action presented no evidence contesting defendants' evidence that abolishment of the office manager position was a legislative act and conceded that it was a legislative act. Acevedo-Cordero and the instant case turned on their own particular facts and the application of summary judgment principles by the lower courts to the facts presented by the parties and not on some differing interpretations or application of legislative immunity.

Plaintiff's contention that legislative immunity may not apply to

claims for declaratory or injunctive relief is at odds with this court's holding in Supreme Court of Virginia v. Consumers Union. In Consumers Union, it was specifically held that legislative immunity bars claims for declaratory or injunctive relief. Consumers Union, 446 U.S. at 732-34.

Other cases relied upon by plaintiff are distinguishable. Calhoun v. St. Bernard Parrish, 937 F.2d 172 (5th Cir. 1991), concerned issuance of a building permit, not abolishment of a position which is the issue in the instant case. In Calhoun, the legislative action could be attacked on its face and was not dependent on proof of motive which is essential to plaintiff's claims.

Plaintiff has also cited Harlow v. Fitzgerald, 457 U.S. 800 (1982), in support of her claim that legislative

immunity does not apply in this case. Harlow, is a leading case in the area of qualified immunity and does not discuss or limit the application of legislative immunity.

5. Applying legislative immunity to bar plaintiff from proceeding against Buncombe County where local legislators would be forced to testify about legislative acts to defend the County is consistent with decisions of the Supreme Court.

To establish a claim against Buncombe County and against the defendants sued in their official capacity, plaintiff was required to prove that abolishment of the office manager position and her subsequent layoff was caused by a policy or custom of the county. See City of St. Louis v. Praprotnik, 485 U.S. 112, 121-22 (1988). Plaintiff has not presented evidence of any general policy or custom that may have caused abolishment of the office manager position. Indeed, the county's Personnel

Policy and Procedural Manual specifically protects the right of county employees to participate in political activities. (Joint App. at 120). Judge Luttig noted that plaintiff failed to present any evidence to support a finding that her layoff was the result of any policy or custom of the county. Because plaintiff did not establish a factual basis to support a finding that the county could be liable, it is premature to address the issue of whether legislative immunity could bar the claims against the county.

Nevertheless, Supreme Court precedent requires that legislative immunity be applied to protect legislators from testifying about their legislative activities regardless of whether they are parties to the underlying action or are merely witnesses for another entity that has been sued by plaintiff. Plaintiff has

not alleged any general policy of the county that could support her claims against it. Instead, she focuses on the single act of abolishing the office manager position which has been conceded to be a facially valid legislative act. Presumably, plaintiff intended to rely on that single act to establish a custom or policy of the county. To use such an act as a basis for liability against the county plaintiff would have to inquire about the legislators' motives for enacting the legislation. This, the doctrine of legislative immunity forbids. Because plaintiff's attempts to assert her claims against the county would necessarily infringe upon the purposes underlying legislative immunity, Judge Hall correctly concluded that she may not pursue her claim.

In Gravel, an aide to a United States

Senator was subpoenaed to testify before a grand jury that was investigating whether there were any violations of federal law in connection with release and publication of the Pentagon Papers. The Senator moved to quash the subpoena to prevent his aide from having to testify. This Court held that the aide could not be required to testify about conduct that would be protected if it had been performed by the Senator himself even though neither the Senator nor his aide were parties to the underlying proceeding. Gravel, 408 U.S. at 616-21.

Legislative immunity is not only a shield from damages, but protects legislators from the burdens of litigation and from being "questioned in any other place [besides the legislative body itself]" about legislative actions. U.S. Const. Art. I, Sec. 6., construed in

Tenney, 341 U.S. at 372-73 (emphasis added). Likewise, Judge Hall correctly concluded that the county commissioners could not be forced to testify about matters before their legislative body even though they would not be called upon to answer personally for the conduct in question.

Plaintiff's assertion that this Court has not applied governmental immunity to a legislative body is incorrect. This Court held in Consumers Union that legislative immunity barred claims against members of the Supreme Court of Virginia and the Court itself when the Court was exercising a legislative function that had been delegated to it by the state legislature. Consumers Union, 446 U.S. at 731-34, 100 S.Ct. at 1974-76.

The plaintiff points to cases that are distinguishable from the instant case

in support of her argument. In Aitchison v. Raffiani, the Court held that legislative immunity protected individual legislators from an action challenging a decision to abolish the position of assistant building inspector. The court also held that plaintiff's claims were barred by the statute of limitations. Thus, the court's statements concerning legislative immunity, were dicta which were not necessary to resolution of the issues before the court. Likewise, the plaintiff's claims in the instant case against the county were ultimately decided on grounds other than legislative immunity -- specifically, that plaintiff failed to establish any custom or policy that may have caused the alleged constitutional violation.

Vandenplas v. City of Muskego, 753 F.2d 555 (7th Cir. 1985) and Personnel

Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1978) did not even address the issue of legislative immunity. It is inapposite to suggest that there is some conflict between the Fourth Circuit and other circuits or between the Fourth Circuit and the Supreme Court when the cases relied upon did not even address the issue planitiff wants to present. In any event, the statements of Judge Hall concerning legislative immunity are consistent with pronouncements of the Supreme Court.

CONCLUSION

Based on the foregoing, it is respectfully requested that the Petition for Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED,

William A. Blancato
Attorney for Respondents

APPENDIX

Section 153A-76. Board of commissioners to organize county government.

The board of commissioners may create, change, abolish, and consolidate offices, positions, departments, boards, commissions, and agencies of the county government, may impose ex officio the duties of more than one office on a single officer, may change the composition and manner of selction of boards, commissions, and agencies, and may generally organize and reorganize the county government in order to promote orderly and efficient administration of county affairs, subject to the following limitations:

(1) The board may not abolish an office, position, department, board, commission, or agency established or required by law.

(2) The board may not combine offices or confer certain duties on the same office when this action is specifically forbidden by law.

(3) The board may not discontinue or assign elsewhere a function or duty assigned by law to a particular office, position, department, board, commission, or agency.

(4) The baord may not change the composition or manner of selection of a local board of education, the board of health, the board of social services, the board of elections, or the board of alcoholic beverage